No. 433.

Brief of Smith for Appellant

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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 433.

EDWARD SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

BRIEF FOR APPELLANT.

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IN THE

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STATEMENT OF CASE.

The plaintiff in error was, by the grand jurors of the United States in and for the District of Columbia, by indictment No. 21518 of the supreme court of said District, indicted for murder, and upon arraignment and plea of "not guilty," on February 17, 1898, after trial, convicted.

Upon an exception taken at the trial to a certain portion of the court's charge, the question of law thereby involved was carried by appeal to the Court of Appeals of the District of Columbia, which court, by a majority, affirmed the instruction of the lower court. The cause now comes on to be heard here in consequence of this honorable court granting a writ of certiorari to the said Court of Appeals.

ERROR ASSIGNED.

The error complained of in the instruction of the *nisi prius* court and as affirmed by the appellate court is shortly as follows:

By an act of Congress approved January 15, 1897, juries in the United States courts are empowered to qualify their verdicts in capital cases as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life" (29 Stats., 487).

There are four other sections to this act, but as they do not qualify or in any way diminish the effect of this, the first one, they are, for the sake of space and time, not quoted here.

The part of the instruction of the trial court which was affirmed by the Court of Appeals, constituting the error complained of, is as follows:

"Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law fixes. You are not responsible for that penalty; neither am I. The existence of that law is well known to the community. The man who violates the law by committing murder should anticipate the infliction of the death penalty. In so perpetrating murder, he must do it with his eyes open to the consequences. The legislature probably intended that in

cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged." (See Record, page 8.)

To this the defendant below excepted, and submits the Court of Appeals erred in affirming, for the language of the statute is plain, and it is maintained and respectfully submitted the act gave and does give, as it expressly says, the jury the right in "all cases" to qualify their verdict.

ARGUMENT.

The question simply stated is this: Did Congress intend to give juries the unlimited discretion to qualify their verdicts, or was it the intention of Congress that such discretion should be exercised only in cases where there were mitigating or palliating circumstances? If the former is the true premises the instruction of the trial court was error and should be reversed; if the latter be correct, then there is no error and the same should be affirmed. It therefore is our purpose to show the former to be the true standpoint from which to view the statute; in other words, that Congress intended what it has expressly said, or that juries were to have the unlimited discretion and power to qualify their verdicts. If we succeed in demonstrating this we shall ask that the judgments complained of be reversed.

Vattel lays down the first general maxim or rule of interpretation to be,

"It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it, is to endeavor to elude it" (Pot. Dwr. Stats., 126).

We find the same rule given in Mr. Justice Potter's edition of Dwarris, in these words:

"In the enactment of statutes the rule of interpretation is, in respect to the intention of the legislature, that where the language is explicit the courts are bound to seek for the intention in the words of the act itself, and they are not at liberty to suppose or to hold that the legislature intended anything different from what their language imports" (page 146).

We submit there is little need to go further. Can it be said the language of this statute is not explicit? Had Congress intended any restriction upon the comprehensive expressions used, is it not just and reasonable to suppose that they would have said so? Has the court, then, any right to read into an enactment, where the words are plain, something which is neither expressed therein nor reasonably to be implied?

Mr. Justice Story, in the first volume of his work on the Constitution, expresses the above rule in this language:

"It has been observed, **with great correctness,** that although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its letter. **It would be dangerous in the extreme to infer from extrinsic circumstances that a case, for which the words of an instrument expressly provide, shall be exempted from its operations"** (section 427).

Upon the maxim, *ita lex scripta est*, so much may be cited and said that it becomes difficult to know just where to draw the line. We assume, however, that one or two cases in point will not be amiss.

Mr. Justice Story, speaking of the Constitution, in delivering the opinion of this court in the case of Martin *vs.* Hunter's Lessee, 1 Wheaton, 347, says:

"We can only construe its powers and cannot inquire into the policy or principles which induced the grant of them."

And, in the case of United States *vs.* Fisher, 2 Cranch, S. C., 390, Mr. Chief Justice Marshall, delivering the opinion of this court, has said:

"If this language was ambiguous, all the means recommended by the counsel for the defendants would be resorted to in order to remove the ambiguity. But it appears to the majority of this court to be too explicit to require the application of these principles, which are useful in doubtful cases."

Again, in the same case, the court observes:

"It is also true that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be **plain,** in which case it **must be obeyed**" (*id.*, 386).

That this rule is clearly settled is too well known to require further citing of authorities; therefore, asking to be indulged while we quote from one other decision of this court, we shall proceed. In the case of The United States *vs.* The Union Pacific Railway Co., 91 U. S., 91, the doctrine is affirmed in this language:

"The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. **We cannot sit in judgment upon its**

wisdom or policy. When we have interpreted its provisions, if Congress had power to enact it, our duty in connection with it is ended."

See also in this connection:

Ruggles *vs.* Illinois, 108 U. S., 543.
Hyatt *vs.* Taylor *et al.*, 42 N. Y., 260.
Dudley *vs.* Reynolds, 1 Kans., 274.
Douglass *vs.* Chosen Freeholders, 38 N. J. L., 216.
Camden, etc., R. R. Co. *vs.* Commissioners of Appeal, 18 N. J. L., 72.
Rudderow, collector, *vs.* State, 31 N. J. L., 518.

From these cases it therefore appears, if the language of the act in question be plain, it was error for the court to go outside of its provisions to ascertain the intention of the legislative power which enacted it.

That the phrase "all cases" includes every case, we refer and ask the court's attention to the cases of—

Martin *vs.* Hunter, 1 Wheat., 339.
Cohens *vs.* Virginia, 6 Wheat., 264.
Mayor *vs.* Cooper, 6 Wall., 251.
Tennessee *vs.* Davis, 100 U. S., 270.

In the first of these Mr. Justice Story makes use of the following argument:

"How otherwise could the jurisdiction extend to *all* cases arising under the Constitution, laws, and treaties of the United States, or to *all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some* cases."

Applying the same test to the case at bar, if, as is said by the trial justice in his charge to the jury, "that there would

be cases in which juries would not be justified in so qualifying their verdicts," would not this act, under such a construction, extend only to **some** and not to **all** cases?

We submit, then, that such an interpretation is, when properly viewed, not alone against the letter, but likewise is in conflict with the spirit of the enactment. It was certainly the purpose of Congress by this statute to remedy some evil or correct some fault in the then existing law or, in other words, in sections fifty-three hundred and thirty-nine and fifty-three hundred and forty-five of the Revised Statutes of the United States. As the last section affects the crime of rape it has no application here. What, then, is section fifty-three hundred and thirty-nine? It provides that: "Every person who commits murder within any fort, arsenal, dock yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; * * * **shall suffer death.**" Can it be disputed that the act of January 15, 1897, has application alone to the penalty prescribed in the above section? This being so, that penalty therein prescribed, which is death, must be the evil which Congress has sought to remedy. How, then, has it sought this remedy? Why, by giving the jury the power in "all cases" to qualify their verdict, or, what is the same thing, to abolish the death penalty in any case they (the jury) may deem proper. But, it has been argued, juries may abuse this power. Whether there may be juries that would abuse the power is not our purpose here to determine, being content to reply to this argument with the words of Mr. Justice Story, as expressed in the case of Martin *vs.* Hunter, 1 Wheat., page 344: "It is," says the learned justice, "always a doubtful course to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given." The writer,

however, finds it difficult to conjecture how an unlimited power can be abused.

It is laid down in Heydon's Case, 3 Reports, page 7, "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

I. What was the common law before the making of the act?

II. What was the mischief and defect for which the common law did not provide?

III. What remedy the Parliament both resolved and appointed to cure the disease of the Commonwealth.

IV. The true reason and remedy; and then the office of all the judges is always to make such construction **as shall suppress subtile inventions and evasions for continuance of the mischief,** and, *pro privato commando*, to add force and life to the cure and remedy according to the true intent of the makers of the act, *pro bono publico.*

It is clear that section fifty-three hundred and thirty-nine, Revised Statutes of the United States, was the law before the passage of the act in question. Is it not equally as clear from what we have just said that the death penalty was the mischief or defect sought to be remedied for which the common (old) law did not provide (or rather in this instance did provide)? It is equally as clear that the act of January 15, 1897, is the remedy that Congress has resolved and appointed to cure the disease as it is that section fifty-three hundred and thirty-nine is the old law containing the disease. What, then, is the true reason and remedy? May it not be assumed with as much propriety and safety as any other assumption which is capable of being made in connection with this stat-

ute, that the act here in question being the direct outgrowth of several bills introduced in Congress to abolish in terms capital punishment, that Congress, not being satisfied to take the responsibility of so radical a departure, has pursued a middle course and allowed the jury to do so in each, every, and "all cases" where they may deem it proper? If this be true, must not the decision complained of be wrong and should not it be reversed?

That this assumption is well founded or, in other words, that it is more reasonable to infer from this statute an intent to allow the jury to abolish capital punishment than to merely qualify their verdicts in cases where there are mitigating or palliating circumstances, is evinced by an examination of the remaining four sections of the statute. By sections two and three, without quoting them at length, saving the exceptions therein enumerated, capital punishment is in terms abolished. Section four has reference to the retrospective effect of the act, and section five reduces the punishment for rape committed by any Indian within the Indian reservations to **imprisonment** at the discretion of the court. Is not the tenor of this act one to abolish capital punishment? This being true, is not the assumption, in the light of the rule "that the intention of the lawgiver is to be deduced from a view of the whole and of every part of the statute taken together" (Dwarris' Stats., 658), but a fair one?

Another rule of law for the better interpretation of statutes, as stated in Potter's edition of Dwarris, at page 42, note, and affirmed by this court many times, among the last being the case of Willis *vs.* Eastern Trust and Banking Co., 169 U. S., 295, is: "Where the English statutes are adopted into our own legislation, the known and settled construction of them by the courts of law is considered as silently incorporated into the act or is received with all the weight of authority."

In the State of Louisiana a very similar enactment to the

act of January 15, 1897, prevails. It enacts "that in all cases where the punishment denounced by law is death it shall be lawful for the jury to qualify their verdict by adding thereto 'without capital punishment,' and that whenever the jury shall return a verdict qualified as aforesaid the person convicted shall only be sentenced to hard labor for life in the State penitentiary."

The court's attention is directed to the striking similarity of the two enactments, the act of January 15, 1897, providing "that in all cases where the accused is found guilty of the crime of murder or of rape under section fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

This court, by Mr. Justice Gray, in the case of Willis *vs.* The Eastern Trust and Banking Co., cited above, which was a case that came up from this District under a writ of certiorari, has said:

"The resemblance between the provisions of the Massachusetts statute of 1860 and the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, **must be considered as having been adopted by Congress with the text thus expounded.**"

Is not this equally as true with the two statutes above set out? Are they not almost identical? Looking, then, at a few of the decisions of the supreme court of Louisiana under their statute prior to the passage of our act of Congress, we find, in the case of The State *vs.* Shield, 11 La. Ann., 395, that court, in passing upon the very point here at issue, on an error assigned to the following instruction:

"Murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict, in order to deter others from crime," holding:

"Such a charge was calculated to impress upon the minds of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death it shall be lawful for the jury to qualify their verdict by adding thereto, 'without capital punishment.'

"We think the discretion of the jury should not have been trammeled by instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner."

In another case, State *vs.* Melvin, 11 La. Ann., 537, arising upon a similar exception the supreme court of Louisiana has expressed itself against the validity of such an instruction as follows:

"The qualification of the verdict should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused.

"We are not insensible to the public evils, deprecated by the district judge, and which naturally provoked the strong expressions contained in his charge.

"But we are sitting as judges, to apply the laws as they are to a particular controversy, growing out of facts, not as legislators to originate and prescribe general rules for the future. If existing laws are found to work badly, the remedy is to be sought at the hands of the power which enacted them. Whilst they remain upon the statute books, they must be obeyed by the courts without reference to their expediency."

It is submitted, then, if these decisions of Louisiana, as has been said by this court, are to be considered as having been adopted by Congress as part of the act of January 15, 1897, the question is ended and the judgments of the honorable courts below can be none other than wrong.

We now reach the conclusion of our argument, for with the examination of the decisions of the various States upon similar acts of their legislatures there remains nothing more to be considered. These decisions are largely those upon which the learned Court of Appeals of the District of Columbia bases its judgment. Should we show that court to be mistaken in its understanding of these cases we will, we submit, have removed the last obstacle in our way to a decision of this honorable court in our favor.

It may be well to observe in connection therewith that the proposition upon which the learned Court of Appeals lays most stress is not our position. We do not dispute that it is the province of the court to interpret laws and of the jury to pass upon the facts; this is too elementary for question. We undoubtedly admit its correctness, maintaining, however, that the trial court in this case in the exercise of this province has wrongly interpreted a law by holding it to mean one thing when it distinctly says and means another. This is our position, and with these observations we pass to the decisions of the State courts.

There are similar statutes to this act of January 15, 1897, in the States of Alabama, California, Georgia, Illinois, Louisiana, Mississippi, and Utah (when a Territory).

ALABAMA.

The Alabama statute prescribes:

"Any person who is guilty of murder in the first degree must, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury."

Alabama Criminal Code, section 3729.

In the case of Brown *vs.* The State, 109 Ala., pages 80 to 84, inclusive, the court was called upon to decide the same question as the one at issue, the trial court having instructed the jury, in part, as follows:

"While the jury are invested by the law with this discretion, the court charges you that it is a legal discretion, one which is a duty devolved upon the jury by the law to be exercised as a grave and solemn duty; and the jury in so determining the punishment may consider the character of the offense and the circumstances of its commission if it was committed by the defendant, and all the facts connected with or attendant upon the occurrence as shown by the evidence, and should then determine from a sense of duty which of the punishments so left to their discretion by the law is proper in the case and is best calculated to deter others."

The supreme court of Alabama in reviewing this instruction said:

"The true interpretation of this instruction, that which it was intended the jury should adopt and by their verdict effectuate, is that death should be affixed as the punishment unless they found in the facts and circumstances of the case some special or peculiar reason for fixing the milder punishment. * * * The instruction is not only erroneous in its construction of the statute to which it refers, but is an invasion of the province of the jury. * * * There is no more marked characteristic of the reformation of our criminal law, wrought and intended to be wrought by our penal code and its successors, than the abolition of capital punishment.

"It is never visited except by a jury on their own responsibilty, controlled by their own consciences, and it is not contemplated that the suggestion of their own consciences shall be directed by the judge presiding. * * * The discretion is legal in the sense that it is derived from and conferred by law, but it is not of the nature of a judicial discretion, which is said to be controlled by fixed legal principles.

"If such had been the discretion the law-makers contemplated, it is but a just presumption that judges, not juries, would have been clothed with it. The law-makers were not

unmindful of the constitution of juries nor of the varied considerations, thoughts, and sentiments which will govern them, the indulgence of which there is no purpose to forbid. It must have been foreseen and anticipated that there would be jurors reluctant to inflict capital punishment. * * * The presiding judge performs his whole duty when he informs the jury that the law commits to them the selection of the punishment which must follow conviction. The idea which seems to be shadowed out, if it is not distinctly expressed in the instruction, is that it is the duty of the jury to impose the graver punishment unless they find some reason in the peculiar facts of the particular case for the imposition of the milder punishment."

In this last case, however, it seemingly appears, although these words are those of the justice delivering the opinion of the court, and the only opinion delivered, that in this particular point the majority of the court did not agree, for which reason the case was cited by the Government at the hearing in the Court of Appeals of the District of Columbia. Nevertheless, the remaining judges composing the court of Alabama were content to allow the above expressions to be placed in the opinion of the court, and delivered no dissenting ones. Such quiet acquiescence on their part, we submit, can certainly be construed in no way against the appellant.

CALIFORNIA.

The California statute prescribes:

"Every person guilty of murder in the first degree shall suffer death or confinement in the State prison for life, at the discretion of the jury trying the same, or upon a plea of guilty the court shall determine the same" (sec. 190, Penal Code, as amended March 28, 1874).

Under this enactment there have been many decisions by the supreme court of California, and of the most important, shortly, as follows:

The first is that of The People *vs.* Welch, 49 California, 179, where the court says:

"Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed."

Nevertheless, the court's attention is respectfully called to the fact that it is not here laid down by what rule the jury is to be governed in their judgment, leaving it entirely with them to decide, in the exercise of their unlimited discretion, for the court further says:

"It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result was capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the statute definitions, the legislature intended to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty and of substituting another punishment in its stead. * * * We may say * * * that it was the purpose of the legislature, by amendment of section 190, to permit the jury, in a case where the facts proved brought the crime of the defendant within the statutory definition of the higher offense, but they believed the punishment of death too severe, to declare that he should be imprisoned for life."

It is respectfully submitted, where the jury is allowed to qualify its verdict "in a case where the facts proved brought the crime of the defendant within * * * the higher offense" (first-degree murder), their judgment certainly could not be in any way governed by mitigating or palliating circumstances; but, on the other hand, permission to so qualify their verdict, without any rule laid down with regard thereto, was a permission to do so in all cases at their discretion.

The next cases are The People *vs.* Jones, 63 California, 169; People *vs.* Murdock, 64 California, 371; People *vs.* Brick, 68 California, 190, and People *vs.* Olsen, 80 California, 128. All of these last-mentioned cases are short and ill-considered, basing their judgments, as they state, on the case of People *vs.* Welch, 49 California, 179, first above considered. While they seemingly hold contra to our contention, still, if their authority is the case of The People *vs.* Welch, this is impossible, as we have, in our consideration of that case, endeavored to show. Again, in The People *vs.* Murdock, 64 California, 371, the court said:

"With this power of discretion a court cannot interfere. The jury should be left entirely free to act according to their judgment."

Notwithstanding this last expression, the decision of the court seems to be the other way, but, as they are all so poorly considered, it is not safe to place much reliance upon them.

The question was again brought up and reargued before the supreme court of California in the case of The People *vs.* Bawden, 90 California, 197, and the court, after some little consideration, said:

"Appellant contends for a reversal on account of the instructions given by the court. * * * By these instructions the jury were told substantially that if they found the defendant guilty of murder of the first degree, and also found some extenuating facts or circumstances" (which your petitioner submits is a contradiction in terms), "it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that if the evidence did not show such extenuating circumstances, then they should allow the death penalty to be imposed. If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the legislature intended to give to the jury the entire power of fixing the punishment in such a case uninfluenced by the court. * * *

But these instructions are literal copies of instructions given and approved by this court in People *vs.* Brick, 68 California, 190. * * * Therefore we decline to reopen the question, and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain."

As to the case of People *vs.* Brick, referred to in this case, its authority is the case of People *vs.* Welch, 49 California, above cited and considered.

We come now to the last case on the subject decided by the California court, which is that of People *vs.* Kamaunn, 110 California, 613. In this case the court said:

"There was no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court cannot direct or advise them upon the subject further than to inform them of their function."

And to the same effect, it would seem, is the case of The People *vs.* Leary, 105 California, 495. We therefore submit that if ever such was the law in this State, the better judgment of that court, in the last two cases cited, has reversed the same; but we respectfully maintain that, taking the case of People *vs.* Welch, 49 California, 179, as the authority for all subsequent thereto, but prior to the last two cited, it cannot be in truth said to have been so decided, even in California.

GEORGIA.

The Georgia statute prescribes:

"The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend. If the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life."

As in California, so under this enactment, there are quite a number of decisions by the supreme court of Georgia. But, before we proceed to these, there is another decision by the supreme court of this State under a similar statute which is referred to in all, or nearly all, of the cases under the enactment above set out. It is the case of Johnson *vs.* State, 58 Georgia, 491, which was a prosecution for the larceny of a cow and is punished under the Georgia statutes by confinement in the penitentiary from two to four years, "unless the jury trying the case shall recommend the prisoner to mercy; in which event he shall be punished * * * not more severe than the chain gang; fine of a thousand dollars and imprisonment six months." The court in this case, 58 Georgia, 491, says:

"So that a recommendation to mercy grades this offense as less than felony, keeps the prisoner out of the penitentiary, and is a great right to which the defendant is entitled by law. What is that right? It is a right for the jury to say whether he shall be sent to the penitentiary or not. Under what circumstances? Under all circumstances. The law does not limit it to a case of mitigating circumstances or any peculiar circumstances whatever. * * * It is lodged, too, by the General Assembly, whether wisely or not we are not called upon to say, in the jury, and not in the judge.

"Ordinarily, punishment, its degree and extent, is vested in the court, * * * but the statute in these offenses vests it in the jury, to the extent of saying that this man shall not go to the penitentiary. Whether they ought not to be merciful, is for them to say, independently of directions from the court as to the circumstances which would justify them in so saying."

The first case under the Georgia statute in regard to murder is that of Hill *vs.* State, 72 Georgia, 132, where the supreme court said:

"The court below instructed the jury: 'If you find this defendant guilty, then you have a right under our law

either to find him guilty without recommendations, or you have the right if you find him guilty to recommend that he be punished by imprisonment in the penitentiary for life. If you find him guilty, it is for you to consider the case and say whether it is a proper case for that or not. You are not to be governed in that instance by your sympathies, but by your judgment, to say whether or not it is such a case as it ought to be done. You must be governed by your judgment, approved by the evidence * * * in the case and the law applicable to it, and then to say what is your duty as twelve upright sworn jurors.' * * * This statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder. It is not limited or circumscribed in any respect whatever. This law does not prescribe any rule by which the jury may or ought to exercise this great discretion. It does not say that the jury are not to be governed by their sympathies, and that they are to be governed by their judgment, as instructed by the court below. The court below imposed by its charge restrictions upon the jury unauthorized and unwarranted by the statute."

In the next case, Inman *vs.* State, 72 Georgia, 280, the instructions of the lower court were similar to those in the case last cited, but the supreme court on review saw a distinction, holding as follows:

"We do not think that the language used by the court was calculated to deprive, circumscribe, or restrict the jury in the exercise of their rights to recommend that the accused be imprisoned for life in the penitentiary; in this respect it differs from Hill *vs.* State, decided at the last term of the court.

"Yet we think in cases like this the better practice would be for the court to call the attention of the jury to the law, and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life. This was substantially done by the court in this case."

So, too, in the next case, Valentine *vs.* State, 77 Georgia, 481, the court said:

"The distinction taken between the case of Hill *vs.* State and Inman *vs.* State also exists here;"

and further on, referring to the case of Johnson *vs.* State, 58 Georgia, 491, said:

"Moreover, the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'Why, then, you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

And in the last case in Georgia, *i. e.*, Thomas *vs.* State, 89 Georgia, 480, it is held that "such recommendation is in all cases matter of discretion with the jury."

ILLINOIS.

The statute in this State prescribes:

"Whoever is guilty of murder shall suffer punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict."

In the two Illinois decisions under this act, Nowacryk *vs.* State, 139 Illinois, 336, and Fletcher *et al. vs.* State, 117 Illinois, 184, the question was whether testimony of mitigating facts could be given in evidence by the accused in order that the jury might qualify their verdict, and the supreme court of that State very properly held that although the character of the testimony was such as to render it inadmissible at the trial under common-law rules, still under the act it was

proper for the purpose of allowing the jury to qualify their verdict if they deemed proper.

It is submitted that it is too plain for argument, such a rule goes no further than for the benefit of the accused and cannot be construed, *e converso*, to preclude the jury from qualifying their verdict in a case where there may not be such evidence. For, in the case of Fletcher *vs.* State, 117 Illinois, 184, above cited, the court says:

"In the contemplation of this statute there may be every technical element of murder existing, and yet the circumstances be such that the jury would be justified in imposing punishment by confinement in the penitentiary for fourteen years only."

LOUISIANA.

The Louisiana decisions have been considered, so we will not consider them here.

MISSISSIPPI.

The Mississippi statute prescribes:

"That in all cases when any person or persons upon conviction of crime shall or may be punished with death, the jury may, in their discretion, in their verdict, declare that the penalty, or punishment, shall be imprisonment in the penitentiary for life; but if the jury shall omit to so declare the penalty in their verdict, then the court shall pronounce the death penalty."

Mississippi Acts, 1875, page 79.

Under this statute in the case of Spain *vs.* The State the trial court instructed the jury as follows:

"If the jury simply find the accused guilty as charged in the indictment it will be the duty of the court to pronounce the death penalty; but if the evidence in the case warrants them in so doing, they may find him guilty as charged, 'and declare that the punishment to be inflicted shall be imprisonment in the penitentiary for life,' or they may find the defendant not guilty."

The supreme court of Mississippi, in reviewing the correctness of this instruction on appeal in the above case, said:

"The judgment must be reversed because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to affix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The right of the jury to fix the punishment as indicated is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death if the jury so determine by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or any view it might take of it."

UTAH.

In Utah a somewhat similar statute prevails—*i. e.:*

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court."

Having examined all the decisions of the various States under similar statutes, we have reserved for the last the decision of this honorable court cited and relied upon by the Government in its brief before the Court of Appeals, viz., Calton *vs.* Utah, 130 U. S., 86.

That decision was simply this: The trial court went to the other extreme and did not so much as inform the jury that such a statute existed, or of their rights under it, and of course this court held it error. We wish to direct attention to what this court said in that case as holding the doctrine for which we here contend:

"The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the pun-

ishment for which by imprisonment for life at hard labor will suffice to meet the ends of justice."

We submit there is nothing said about mitigating circumstances, but, on the other hand, the jury are restricted, if at all, only to that which "will suffice to meet the ends of justice," leaving it to them to say what will in each case accomplish this. Proceedings, this court says:

"The jury to whom the statute commits the determination of that question, at least in part, were not informed of their duty and responsibility."

Here it is desired to direct the court's attention to the provision in the Utah statute which places the punishment, even after a recommendation by the jury, "at the discretion of the court." Can it not be inferred from this language of your honors, had the Utah statute been as the one in question, with no discretion in the court upon a recommendation by the jury, that this court would have construed that statute to have committed the determination of the punishment to the jury not "at least in part," but in the whole, and that the statute under consideration should be so construed?

In consequence of the foregoing it is respectfully submitted that, whatever premises may be assumed, the conclusion reached is that the court below erred in affirming the instructions given by the trial court; therefore it is respectfully asked that the judgment be reversed.

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